Approved: 2-2-98
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Tim Emert at 10:11 a.m. on January 28, 1998 in Room 514-S of the Capitol.

All members were present except: Senator Feleciano (excused)
Senator Gilstrap (excused)
Senator Goodwin (excused)

Committee staff present: Mike Heim, Legislative Research Department
Jerry Donaldson Legislative Research Department
Gordon Self, Revisor of Statutes
Mary Blair, Committee Secretary

Conferees appearing before the committee: Marla Luckert, Chair, Ks Criminal Law Advisory Committee
Kay Falley, Ks Asso of Dist. Court Clerks and Administrators
Don Moler, League of Kansas Municipalities

Others attending: See attached list

The Chair announced that the Judiciary Committee will meet on Monday, Feb. 2. the deadline date for bill introduction requests.

A bill request by the members of the Permanency Planning Council addressing Guardianship for Voluntary Relinquishment was introduced by Senator Petty. It passed unanimously on a motion by Senator Petty and a second by Senator Bond. Senator Petty also introduced a bill, Repealer for the Death Penalty, which passed unanimously on a motion by Senator Petty and a second by Senator Bond.

SB 482 - An act concerning expungement; relating to diversion agreements; arrest records; violations of city ordinances

Conferee Luckert testified in support of **SB 482.** She discussed her committee's study of the expungement statute. She stated that reportedly there was confusion about the meaning of "expungement", a term which means "to seal up" and that although there was a procedure in place to expunge records of a conviction, there was no procedure in place to expunge the records for persons who had been arrested but were not convicted. She stated that **SB 482** remedies this and she explained how by detailing procedural changes and other provisions to the bill. (attachment 1)

Conferee Falley discussed her organization's request for an amendment that would delete the second sentence of K.S.A. 22-2911(b). (attachment 2). During discussion, Conferee Luckert clarified that K.S.A. 22-2911 was not amended by **SB 482**. She stated that in K.S.A. 22-2911, under current procedure, the whole file is not sealed; just the diversion agreement itself and it causes tracking problems for the court where records are filed.

Conferee Moler testified as an opponent of **SB 482** discussing the following concerns regarding the bill: increased cost to local government; need for dual record-keeping system for law enforcement; and a clerical "nightmare" for overburdened courts. He urged the Committee to study the bill carefully. (attachment 3)

Written testimony opposing **SB 482** was submitted by Kyle Smith, Kansas Bureau of Investigation, (attachment 4) and Mike Taylor, The City of Wichita. (attachment 5)

SB 215 - Effect of felony conviction on civil rights of convicted felon

Conferee Luckert testified in support of **SB 215**. She stated that the purpose of the bill is to "clarify several inconsistencies in Kansas statutes relating to the civil rights of a convicted felon" and she elaborated on them with the use of a chart which showed the current law, the inconsistency and problems and the solution provided in **SB 215**. (attachment 6)

Following discussion regarding a clerical error in **SB 449** on pg 1 line 21 where the word crimes should be singular, Senator Petty moved to amend **SB 449** by striking the s and pass the bill as amended, Senator Bond seconded. Motion carried.

The meeting adjourned at 10:50 a.m. The next scheduled meeting is January 29, 1998.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-28-98

NAME	REPRESENTING
Kyle Smith	KBI / KPOA
Mike Taylor	City of Wichita
Don Moler	League of KS Mun.
John Reinhart	Lifesaver Interlock
Kathy Olsen	KS Bankers Assn
Rannie Ann Brown	KS Govt Consult
Kathy Porter	OJA
Kay Falley	KADCCA
Christy Molzen	Judicial Council
Marla Luckert	Judicial Council
Randy M. Hearrell	Judicial Council
Roger N. Walter	KS Securities Com.
David Lord	KS Securities Commission
Jane McClenahan	Bek-SEC
Ann Durkes	DOB
Irene Johnson	Ks. ASAP Assn
Natalie Haag	Gov. Office
Dee Nye	Sen Emert office
Helen Stephens	KPOA / KSA

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-28-98

NAME	REPRESENTING
Bill Lucas	MVFR
Jim Clark	KCDAA

5 Jud 1-28-98 att 1

JUDICIAL COUNCIL TESTIMONY ON SB 482

At the request of the legislative members of the Judicial Council, the Criminal Law Advisory Committee was asked to study the expungement statutes. Reportedly, there was some confusion as to the meaning of "expungement". Also, there apparently had been a number of inquiries as to why the statutes did not allow for the expungement of arrest and diversion records. Ironically, a procedure has been in place to expunge records of a conviction. Yet, the individual who was found not guilty, who was arrested but never charged or who was wrongfully arrested did not have the ability to remove the records of the proceedings from public view. The committee heard several stories of individuals who had been arrested because of misidentification and who had lingering concerns that some public records remained which could cloud the person's otherwise good name.

Senate Bill 482 proposes a remedy for such situations.

New section 1 proposes a definition for "expungement" to clarify that the term is meant to seal records and make them unavailable except: (1) as provided in the act; (2) to the petitioner and (3) to criminal justice agencies as provided in K.S.A. 22-4701, et seq. [These statutes allow information to be shared within a criminal justice agency or between criminal justice agencies when necessary for the prosecution of subsequent proceedings for the same act].

New sections 2 and 3 provide for the expungement of arrest records where the arrested person is not convicted. The provisions parallel each other with section 2 applying to arrests under municipal codes and section 3 applying to arrests for violations of state statutes. One difference between the provisions is that section 3 allows the municipality to set a docket fee for the expungement; the parallel provision in section 4 provides that there will be no docket fee. The

Senate Judiciary
1-28-98
att 1

procedures detailed in both sections for initiating the expungement are copied from the current expungement statutes as the bill proposes amending those procedures. These changes in procedure can best be illustrated by looking at page 5, lines 33 to 37. The language allows the court to direct the petitioner to give notice and adds a requirement that the arresting law enforcement agency be notified of the request for expungement so that they may be heard.

Under sections 2 and 3, the court may grant the petition to expunge the arrest records upon finding:

1. The arrest resulted from mistaken identity;
2. The arrest resulted in a finding of no probable cause by the court;
3. The arrest resulted in a not guilty verdict; or
4. The expungement would be in the best interests of justice and:
   (a) charges have been dismissed; or
   (b) no charges have been or are likely to be filed.

If the expungement falls within categories 1, 2 or 3, the records are not available except to the petitioner and to agencies as allowed under K.S.A. 22-4701 et seq. If the expungement is allowed under the circumstance where charges have been dismissed or are not likely to be filed, the court has the discretion to make the records available for any of the purposes listed. The list is a copy of the provisions in current statutes which make expunged records under certain circumstances such as where background checks are being performed or application is being made for employment positions in criminal justice agencies, positions in institutions licensed by SRS, in gaming and racing businesses. The full list may be found at page 2, lines 11 through 40.

Sections 4 and 5 amend the current expungement statutes, section 4 relating to expungement of convictions under municipal ordinances and section 5 relating to expungement of convictions under state statutes. These amendments clarify that diversion agreements and proceedings resulting in diversion agreements may be expunged. There is also clarification that the records which become sealed are to include the records of arrest. Finally the changes in procedure discussed before regarding notice are made in the existing statutes. There also are some technical amendments to make language parallel and to incorporate recent changes in the law such as providing for cigarette and tobacco infractions.

Testimony of Kansas Association of District Court Clerks and Administrators
Wednesday, January 28, 1998
Senate Judiciary Committee

To Chairman Emert and Committee Members:

I am here today representing the Kansas Association of District Court Clerks and Administrators.

We would ask that SB 482 be amended by deleting the second sentence of 22-2911(b) that states "The terms of a diversion agreement which have been fulfilled shall be confidential and shall be available only to any city, county or district attorney or court or the attorney general." The proposed amendment is attached to the testimony.

When a criminal or traffic diversion agreement is filed, it is an open case until the diversion is completed. Once the diversion is completed, the diversion agreement document then becomes confidential.

Closing these records is a time consuming process as there is on-going monitoring to know who has completed diversion. Once completed, the file has to be pulled, the diversion agreement placed in a sealed envelope, stamped confidential, refiled, and removed from the appearance docket. There is also the element of human error in missing some case or cases that should be confidential.

The diversion agreements in juvenile cases are handled somewhat differently in that some are confidential (under 14 years of age) and some remain open (14 years or older). For consistency, we would ask that juvenile cases also be allowed to be expunged.

Thank you for allowing me the time to speak to you. I will be happy to answer any questions if there are any.

Senate Judiciary
1-28-98
Att 2

PROPOSED AMENDMENT

22-2911. Failure to fulfill diversion agreement; satisfactory fulfillment; records.

(a) If the county or district attorney finds at the termination of the diversion period or any time prior to the termination of the diversion period that the defendant has failed to fulfill the terms of the specific diversion agreement, the county or district attorney shall inform the district court of such finding and the district court, after finding that the defendant has failed to fulfill the terms of the specific diversion agreement at a hearing thereon, shall resume the criminal proceedings on the complaint.

(b) If the defendant has fulfilled the terms of the diversion agreement, the district court shall dismiss with prejudice the criminal charges filed against the defendant. ~~The terms of a diversion agreement which have been fulfilled shall be confidential and shall be available only to any city, county or district attorney or court or the attorney general.~~

(c) The county or district attorney shall forward to the Kansas bureau of investigation a record of the fact that a defendant did or did not fulfill the terms of a diversion agreement required to be filed under K.S.A. 22-2909 and amendments thereto. Such record shall be made available upon request to any county, district or city attorney or court.

(d) The county or district attorney shall forward to the division of vehicles of the state department of revenue a record of the fact that a defendant did or did not fulfill the terms of a diversion agreement required to be filed under K.S.A. 22-2909 and amendments thereto. Such record shall be made available to any city, county or district attorney or court.

History: L. 1978, ch. 131, S. 6; L. 1981, ch. 153, S. 2; L. 1982, ch. 145, S. 2; L. 1982, ch. 144, S. 9; L. 1985, ch. 79, S. 5; L. 1993, ch. 166, S. 3; July 1.

S Jud
1-28-98
att #3

League of
Kansas
Municipalities

Legal Department
300 S.W. 8th
Topeka, Kansas 66603
Phone: (785) 354-9565/ Fax: (785) 354-4186

MEMO

TO: Senate Judiciary Committee

FROM: Don Moler, General Counsel

DATE: January 28, 1998

RE: SB 482

The League very much appreciated the Committee allowing us to testify without written testimony earlier today on SB 482. Specifically, we have several questions and issues which we wish to raise in this legislation. We believe it may well be a mandate on local government in that the costs of implementing such an expungement program relating to arrests, diversions and convictions could be significant. While we note in new Section 2 that the municipal court may prescribe fees to be charged to offset these costs, we believe that the fees could in no way meet the total cost that would be incurred at the local government level. Therefore, we believe it is inevitable that a mandate would result.

The concern that I raised about access to these records by law enforcement is only partially answered in the bill. While it does not close these records to law enforcement, it would apparently require the maintenance of dual systems for these records. For all but law enforcement, one system would have to be maintained in which the records of the arrest, diversion or conviction would be totally expunged. In a second system, there would be maintained the actual records of these activities for law enforcement purposes. A dual system not only would increase the cost to local governments, but would increase the likelihood for errors and the possibility for offenders to slip through the cracks.

Finally, we believe that it would probably create considerable additional complexity, and ultimately expense, in that three different types of expungements would be possible. We expect that all three would have to be handled in a slightly different fashion and the maintenance of those records would all be done in a somewhat different fashion. This is a concern as it adds costs and heightens the possibility of lost, misplaced or inaccessible records.

We very much thank the Committee for allowing the League to comment today on SB 482.

Senate Judiciary
1-28-98
att 3

5SB
1-28-98
att 4

Kansas Bureau of Investigation

Larry Welch
Director

Carla J. Stovall
Attorney General

TESTIMONY
KYLE G. SMITH, CHAIRMAN
KANSAS PEACE OFFICERS' ASSOCIATION LEGISLATIVE COMMITTEE
BEFORE THE SENATE JUDICIARY COMMITTEE
IN OPPOSITION TO SENATE BILL 482
JANUARY 28, 1998

Mr. Chairman and Members of the Committee:

I appear today on behalf of the Kansas Peace Officers' Association in opposition to SB 482.

There is a certain simple logic on first blush that if one can expunge a conviction, it only makes sense to expunge an arrest that did not lead to conviction. We would submit that is a false premise and such action is not justified or is at least outweighed by concerns for officer safety.

First, let me explain the legal distinctions of conviction versus non-conviction criminal records. Conviction records can be expunged under current law and that may be necessary as conviction records are available to the public. This would include potential employers as well as nosy neighbors. There has been a distinct trend in the last several sessions to expand the availability of record checks concerning convictions by requiring record checks for adult care home workers, educators, and a bill this session for locksmiths. The trend seems to be to make conviction information more and more available.

Senate Judiciary
1-28-98
att 4

1620 S.W. Tyler / Topeka, Kansas 66612-1837 / (913) 296-8200 FAX (913) 296-6781

Arrests and diversions, however, would fall under the definition of non-conviction data and are not available to the public. Under Kansas statutory and regulatory law, non-conviction data can only be disclosed to the individual, criminal justice agencies, pursuant to court orders, and to federal agencies conducting investigations.

Release of non-conviction data to a non-criminal justice agency or person is prohibited by state law, K.S.A. 22-4707 and is not only a class A misdemeanor punishable by up to a year in jail and a $2,500 fine, but the statute provides it is automatic good cause for termination of employment if a person is employed by a public agency.

This is why non-conviction data, i.e. arrests and diversions have always been treated differently than convictions. There is no need to expunge those records as they are not generally available and therefore not likely to cause the embarrassment or employment problems that more readily available records might. Further, those agencies that have access to non-conviction information, primarily criminal justice agencies, are keenly aware of the limited evidentiary value or significance of a mere arrest or successfully completed diversion.

Some states, for instance Florida, do not distinguish between arrest records and conviction records and make all such criminal history information available just like telephone numbers or property appraisals. Kansas has taken a more protective attitude, apparently believing that the public and press cannot be trusted to give appropriate weight to non-conviction data and therefore it has been prohibited from being disseminated.

I won't comment on the wisdom of either approach, but the bottom line is that non-conviction data is different and there is not the need for expungement that there may be for conviction data.

Second, Kansas law already provides for expungement of non-conviction records in cases involving extreme circumstances. In *Bradford v. Mahan*, 219 Kan. 450 (1976), the Kansas Supreme Court held that courts have equitable powers to "order inaccurate police records corrected or expunged when unwarranted adverse consequences to a citizen are shown to outweigh the public interest and the right of law enforcement agencies to maintain and disseminate reports useful for the purpose, identification, apprehension and arrest of individuals for criminal activity . . . Expungement or correction of police reports should be limited to cases involving extreme circumstances where such relief is necessary and appropriate to preserve basic legal rights, wherefore arrests or false reports are made without probable cause for purposes of harassment and under circumstances which constitute police misconduct." *Bradford* @ 459. In proper circumstances that ruling could apply to diversions. *State v. Haug*, 237 Kan. 390 (1985).

SB 482 vastly expands the circumstances of when expungement can be pursued to include even the vague "best interest of justice", which means whatever a judge thinks it means. This wholesale expansion of expungement law is unwarranted and unnecessary and constitutes a serious threat to officer safety.

While a mere arrest or other non-conviction information has limited legal significance, particularly in the court, it can be of life saving value on the street. Stopping a vehicle on a lonely stretch of Kansas highway and determining before you exit your vehicle that person has two prior arrests for aggravated battery on a law enforcement officer or carrying a concealed weapon, makes all the difference on how an officer approaches that stop. When contemplating the execution of a search warrant, every effort is made to determine what dangers and risks are posed by the subjects. Again such prior arrests, even if the case did not result in a conviction due to suppressed evidence or some other technicality, could make the difference between life and death to some police officer.

A possible compromise that would allow law enforcement to support this legislation would be to include an exception to the new and old expungement language that would provide law enforcement the same access to expunged records that is available under existing exceptions for applying for a private detective license [21-4619(f)(2)(A)], commercial drivers license [21-4619(f)(2)(e)] or hiring employees at the Lottery or Gaming Commission [21-4619(f)(2)(c)&(d).

Without some amendment to give the officers on the street the same access to expunged records that the Lottery would have in hiring a new custodian, I would ask you on behalf of not just the law enforcement officers of the State of Kansas, but of their wives, husbands and children, to kill SB 482.

I would be happy to stand for questions.

1-28 5 Jud

City of Wichita

Testimony

Regarding
Senate Bill 482

Delivered to
Senate Judiciary Committee
January 28, 1998

Senate Bill 482 mandates that any person may request expungement of municipal court records relating to arrests, diversions and convictions of city ordinances. The City of Wichita has a number of concerns about the impact Senate Bill 482 will have on its Municipal Court. Court officials predict administering the provisions of the bill will be costly, difficult and amount to an unfunded State mandate on Cities and Counties.

The law could open a floodgate of expungement requests. With the large volume of cases handled by municipal court, just keeping up with the paperwork would be a massive and expensive chore. The records check associated with the process would require a lot of extra staff. While a fee can be charged to process the expungement request, it may not be enough to offset the costs. If the expungement is granted, the Municipal Court Clerk must send notice of the order to the FBI, the KBI, the Secretary of Corrections and any other criminal justice agency which may have record of the arrest. Again, extra work and costs.

But it doesn't end with simply erasing the record and sending out notices. Because the arrest information may still need to be available to law enforcement agencies and for various other reasons as set forth in the statute, the records would still have to be maintained in some fashion. Despite the expungement, they cannot be completely deleted out of the database, so the expunged records must then be placed in a separate data base with limited access. The case file concerning an arrest stored in the records section of the Wichita Police Department would have to be physically removed and stored in a separate file which only certain persons could access. Since the Sedgwick County Jail incarcerates all persons for the City of Wichita, notice would have to be sent so the Sheriff can also delete the records. Mug shots and fingerprints would have to be pulled from files and segregated into a separate file or database. Every time information is requested by law enforcement about a person's criminal records, two files or databases would have to be searched in order to catch any expunged information. With the heavy volume of cases handled in Wichita, this creates an expensive and unwieldy situation for court officials and law enforcement authorities .

Senate Bill 482 also raises serious questions regarding law enforcement investigations. Pending covert investigations could be jeopardized if a person petitioned to have their arrest expunged and prosecutors were forced to reveal in court that they planned to charge the person. What about gang intelligence information? Much of it is generated from arrest information. If a gang member requests an expungement, a dual sealed database would have to be set up. And expunged

Senate Judiciary
1-28-98
att 5

in ation could not be used to help profile a gang member at subsequent trials.

The City of Wichita believes the mandates in Senate Bill 482 are unnecessary. Under the Criminal History Record Information Act and the current rules regarding expungements, arrests which do not result in convictions, or for which the resulting conviction has been expunged are not open to the public anyway. So allowing the expungement of these arrest records offers no benefit, but imposes a tremendous burden on law enforcement and court staff.

Allowing expungement of diversion agreements and the related arrest records are unnecessary for several reasons. The bill mandates that all persons going on diversion be told that they have the right to expunge the diversion. This provision would have to be added to existing diversion contracts, creating an avalanche of work for court officials. And again it is unnecessary because records of arrests which result in diversion are only public during the time the case is pending in court. The new law does not allow expungement at that stage anyway, so again there is lots of extra work, but no benefit to allowing expungement of diversions and related arrest records.

Not only would Senate Bill 482 create burdens for law enforcement, it is counterproductive to all of the efforts made in recent years to create and maintain an accurate and complete statewide criminal data base.

SPD, 1-28-98

JUDICIAL COUNCIL TESTIMONY ON SB 215

Judicial Council, through the criminal law advisory committee, proposes SB 215 and urges its adoption. The purpose of the bill is to clarify several inconsistencies in Kansas statutes relating to the civil rights of a convicted felon. The rights affected include the right to hold public office, to vote, to serve as a juror and to possess a firearm. Among these inconsistencies are provisions which are inconsistent with statutes which make it illegal for a convicted felon to possess a firearm. The Judicial Council believes the various rights need to be clarified.

There is a constitutional provision to which the statutes need to conform. Section 4, article 5 of the Kansas Constitution provides:

> No person convicted of a felony under the laws of any state or of the United States, unless pardoned or restored to his civil rights, shall be qualified to vote.

Upon review of this provision and relevant statutes, the Criminal Law Advisory Committee of Judicial Council recommends that, upon conviction, a felon should lose the right to hold public office, to vote, to serve as a juror, but that such rights should automatically be restored upon discharge from supervision.

In contrast to the consitutional provision and the committee's recommendation, several state statutes do not provide for a loss of rights or do not clearly state when the civil rights are restored. The attached chart illustrates the current provisions, inconsistencies or problems, and the proposed solution:

Senate Judiciary
1-28-98
att 6

Current Law	Inconsistency And Problems	Solution Provided in SB 215
K.S.A. 21-4603d: Currently states that if a defendant is not imprisoned, the defendant does not lose any civil rights.	Inconsistent with the Constitution because it requires imprisonment to lose the right to vote. Does not comply with the recommendation that all felons should lose rights upon conviction until supervision is complete.	Section 1, makes the current provision applicable only to offenses before July 1. After that date: 1. Section 3 (a) provides that conviction of a felony makes a person ineligible to hold public office, to register to vote, to vote or to serve as a juror. Amending K.S.A. 1997 Supp. 21-4615. 2. Section 3(b) and Section 2 provide that civil rights are restored when a person is finally discharged from parole, conditional release, postrelease supervision, probation, a community corrections program or other authorized disposition. Amending K.S.A. 1997 Supp. 21-4615. 3. Both sections 2 and 3 clarify that restoration of rights do not relieve the person of the obligation to follow laws regarding possession of a firearm.
K.S.A. 22-3722 Provides that all civil rights are restored upon a certificate of discharge from release of an inmate	Inconsistent with K.S.A. 21-4202 which provides that a person convicted of a nonperson felony may not possess a firearm for 5 years and a person convicted of a person felony may not possess a firearm until the crime is expunged. Also does not cover some federal circuits' requirements that for a person to be federally prosecuted for arms violations the certificate of discharge must clearly state the limitations on the right to possess firearms.	Section 5 adds language to clarify that the discharge does not relieve the felon of complying with statutes regarding possession of a firearm. Requires the certificate of discharge to be specific.
K.S.A. 43-158 Provides that a person who has been convicted of a felony may not serve as a juror for 10 years.	The ten-year limit is inconsistent with other provisions which are tied to supervision or incarceration periods.	Section 6 amends statute to restore rights upon discharge from custody or supervision.

Since this is a carry over bill, some technical amendments are necessary to:

1. Reflect July 1, 1998 as the effective date rather than July 1, 1997.

2. Replace references to 1996 Supp.

3. Provide consistency between this bill and Senate Bill 482. The provisions found in section 4 of Senate Bill 215 amend the expungement statute for state offenses, K.S.A. 1996 Supp. 21-4619. These amendments were proposed before the introduction of Senate Bill 482. The changes proposed here were not included in SB 482 since they were present here. Apparently, records have been destroyed and were not available for one of the allowed purposes. This language would clarify that "expunge" does not mean "destroy." For consistency, this language should also be included in appropriate provisions of SB 482.